

LETTER OPINION
94-L-1

January 3, 1994

Mr. Charles R. Isakson
Mercer County State's Attorney
P.O. Box 39
Stanton, ND 58571-0039

Dear Mr. Isakson:

Thank you for your December 15, 1993, letter asking whether certain economic development records relating to the Community Development Block Grant to Fish 'N Dakota, Inc., are subject to public disclosure as an open record pursuant to N.D.C.C. ? 44-04-18 or whether one of the exceptions applies. Your two-part inquiry asks:

1. Which documents relating to the Community Development Block Grant awarded to Mercer County for the Fish 'N Dakota Project, or portions thereof, are subject to the open records requirements of Section 44-04-18 of the North Dakota Century Code?

2. Does the Office of Intergovernmental Assistance or Mercer County have custodial authority over either disseminating any of such information that is subject to the open records law, or restricting access thereto under such exception as may be determined to be applicable?

N.D.C.C. ? 44-04-18 provides that "[e]xcept as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, are public records, open and accessible for inspection during reasonable office hours." N.D.C.C. ? 44-04-18.2(1) exempts from public disclosure "[r]ecords and information pertaining to a prospective location of a business or industry, including the identity, nature, and location of the business or industry, when no previous public disclosure has been made by the business or industry of the interest or intent of the business or industry

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to locate in, relocate within, or expand within this state." N.D.C.C. ? 44-04-18.2(2) further exempts from public disclosure "[t]rade secrets and commercial or financial information received from a person, business, or industry that is interested in or is applying for or receiving financing or technical assistance, or other forms of business assistance."

The 1989 Final Report of the Legislative Council's Jobs Development Commission lists a number of reasons N.D.C.C. ? 44-04-18.2 was enacted. The report notes that North Dakota was being placed at an "extreme competitive disadvantage" in attracting economic development projects where other states' laws provided assurances that commercial or financial information would not be publicly disclosed. The report stressed the need to maintain the confidentiality of commercial or financial information so that such information would not be disclosed in a manner that might "compromise the competitiveness of businesses applying for [economic development] assistance."

North Dakota did not provide a statutory definition of commercial or financial information and, accordingly, pursuant to N.D.C.C. ? 1-02-02 the words are to be given their ordinary meaning. In my opinion, the loan document and guaranty in question constitute commercial or financial information received from a person or business applying for or receiving financing assistance and are therefore exempt under N.D.C.C. ? 44-04-18.2 from the open records law.

Under the Community Development Block Grant Program, the state Office of Intergovernmental Assistance (N.D.C.C. ch. 54-44.5) as well as cities (N.D.C.C. ? 40-05-01(74)), and counties (N.D.C.C. ? 11-11-14(18)) may be involved in economic development projects to benefit North Dakota. As such, the state Office of Intergovernmental Assistance, as well as the participating political subdivision would share common documents as in this case where both the Office of Intergovernmental Assistance and Mercer County are in possession of documents relating to the loan

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transaction in question. When two agencies share similar documents, it would be advisable for the two custodial officials to jointly determine whether the documents or information fit within an exemption under the open records law so inconsistent disclosure practices would not occur. Each of the custodial officials who have custody of the documents, however, has an independent duty to determine whether the information is an open record.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

dec/pg

cc: Shirley Dykshoorn, Director
Office of Intergovernmental Assistance